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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1979

ORIGINAL COPY

No. 79-6847

DARYL GEORGE HARSHFIELD,

Petitioner,

v.

JAMES G. RICKETTS, Executive Director,
Colorado Department of Corrections, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION Motion to Dismiss

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BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

Daryl Harshfield appeals pursuant to 28 U.S.C. 1254(2). From the Tenth Circuit Court of Appeals affirmance of the denial of his federal habeas corpus petition. Since the Tenth Circuit did not determine any Colorado statute to be "invalid as repugnant to the constitution, treaties, or laws of the United States," appellate jurisdiction under 28 U.S.C. 1254(2) is not proper. The respondent recognizes, however, that habeas corpus questions are reviewable by certiorari, Ex parte Quinn, 317 U.S. 1, 63 S. Ct. 1, 87 L. Ed. 3 (1942), and that this Court will treat matters improvidently raised on appeal as being raised by petition

for certiorari. 28 U.S.C. 2103. Since Mr. Harshfield's jurisdictional statement appears to have been filed with this Court within ninety days of the Tenth Circuit's March 28, 1980 decision, the respondent will treat it as a petition for certiorari and will reply accordingly. Mr. Harshfield will be referred hereafter as the petitioner.

The petitioner pled guilty to charges of rape and devious sexual intercourse by force. Ordinarily, the penalty for each of these crimes would range from five to forty years imprisonment. Colo. Rev. Stat. 1973, 18-1-104. However, since the petitioner admitted four prior felony convictions, he became punishable under the state habitual criminal statute by a term of life imprisonment for either the rape or the deviate sexual intercourse.

The petitioner moved for commencement of proceedings under the Colorado Sex Offenders Act, Colo. Rev. Stat. 1973, 16-13-201, et seq. Under the Act, the petitioner, if found to be a dangerous threat to society, potentially would be punishable by an indefinite term of imprisonment in the state penitentiary. Colo. Rev. Stat. 1973, 16-13-203. After reviewing the reports of two psychiatrists and the Probation Department, the trial court, pursuant to Colo. Rev. Stat. 1973, 16-13-209, terminated proceedings under the Act. The court subsequently sentenced petitioner as a habitual criminal to the state penitentiary for two concurrent terms of life imprisonment.

The petitioner applied to the federal district court for federal habeas corpus relief. Said application was denied, and the decision of the district court was affirmed by the Tenth Circuit Court of Appeals. Here, the petitioner

asserts that the Colorado Sex Offenders Act affords him an unqualified right to a hearing and that termination of sex offender proceedings without a hearing contravenes his rights to due process and equal protection of the law. Initially, the respondents note that the Colorado Supreme Court has construed the Sex Offender Act as not providing an individual with an unqualified right to a hearing thereunder. People vs. Breazeale, 190 Colo. 17, 544 P.2d 970 (1976). Since the highest state court's construction of a state law is binding upon this Court, Groppi vs. Wisconsin, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971), this court must accept that the Colorado Sex Offenders Act does not afford an individual a hearing prior to a decision to terminate proceedings thereunder. People vs. Breazeale, supra.

QUESTIONS PRESENTED

1. Does the Colorado Sex Offenders Act create a liberty interest such that due process requires a hearing prior to a decision to terminate such proceedings?

2. Is equal protection violated by the termination of sex offender proceedings without a hearing?

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions listed by the petitioner, the respondent would cite the following:

> Colo. Rev. Stat. 1973, 16-13-202(3):
> "Department" means the department of corrections.

Colo. Rev. Stat. 1973, 16-13-203. Indeterminate commitment. The district court having jurisdiction may, subject to the requirements of this part 2, in lieu of the sentence otherwise provided by law, commit a sex offender to the custody of the department for an indeterminate term having a minimum of one day and a maximum of his natural life.

Colo. Rev. Stat. 1973, 18-3-401(2). Rape is a class 3 felony....

Colo. Rev. Stat. 1973, 18-3-403(2). Deviate sexual intercourse by force is a class 3 felony.

Colo. Rev. Stat. 1973, 18-1-105. Felonies classified, penalties.... Class 3 felony: minimum sentence -- 5 years imprisonment; maximum sentence -- 40 years imprisonment.

ARGUMENT

I.

SINCE NO LIBERTY INTEREST IS CREATED UNDER THE COLORADO SEX OFFENDERS ACT, DUE PROCESS DOES NOT REQUIRE A HEARING BE HELD PRIOR TO A DECISION TO DISCONTINUE PROCEEDINGS THEREUNDER.

The petitioner contends that the termination of sex offender proceedings without a hearing contravenes due process of law. This argument is, of course, premised upon the belief that the Sex Offenders Act creates a statutory liberty interest to which he is entitled. See, Wolff v. McDonald, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1975).

The petitioner alleges that, under section 211 of the Act, he has a right to indeterminate commitment if the trial court finds beyond a reasonable doubt that, if at large, he would constitute a threat of bodily harm to members of the public (petition, p. 5). The Colorado Supreme Court, how-

ever, has held that the defendant never has a right to be sentenced as a sex offender, even if he were found to be a threat to society. People v. Lyons, 185 Colo. 112, 521 P.2d 1265 (1974). The structure and language of the Act supports the court's ruling. Section 211 does not require a trial court to sentence an individual to an indefinite term upon a finding of dangerous. Rather, section 211 requires only that he be sentenced pursuant to section 203. Section 203 provides:

> The district court having jurisdiction may, subject to the requirement of this part 2, in lieu of the sentence as provided by law, commit a sex offender to the custody of the department of indeterminate term having a minimum of one day and a maximum of his natural life.

(emphasis added).

As is readily apparent, section 211 does not mandate sentencing under the Sex Offenders Act, but ultimately relates back to the court's discretion to sentence the individual either under the Act or as otherwise provided by law. Sections 203 and 209 of the Act, when read together, make it abundantly clear that traditional sentencing concerns have not been supplanted or preempted by the enactment of the Sex Offenders Act. See, e.g., Ibibodeau v. Commonwealth of Massachusetts, 428 F. Supp. 542 (D. Mass. 1977). The respondents submit that the following passage from People v. Breazeale, supra, is dispositive of the petitioner's argument:

> We have here a situation in which there is no constitutional mandate requiring a sex offenders act. The provisions of this act vest a trial court with discretion to commit a defendant under an alternate sen-

> tence. This is similar to the discretion in a court to suspend a sentence or to grant probation.
>
> From the wording of the sex offenders act, it appears that a defendant may require the commencement of a hearing. However, the matter of whether there should be sentencing under the act is an alternative which may be granted or denied by the court, once the psychiatrists' and probation officers' reports have been filed and reviewed. This being a sentencing alternative, a constitutional right is not attained.

544 P.2d at 976. See also People v. Medina, 193 Colo. 190, 564 P.2d 119 (1977); People v. Sanchez, 184 Colo. 379, 520 P.2d 751 (1974). Cf. United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L.Ed.2d 755 (1979) ("Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.")

Moreover, absent his habitual criminal status, the petitioner could have received maximum sentences of up to forty years imprisonment on each count via normal sentencing procedures. Colo. Rev. Stat. 1973, 18-1-105. Under the Sex Offenders Act, however, he potentially could have been imprisoned for the remainder of his natural life. Colo. Rev. Stat. 1973, 16-13-203. In Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967), this Court observed that the Colorado Sex Offenders Act, similar to the current statute but without the current provisions relating to an evidentiary hearing prior to sentencing thereunder, was enacted for the purpose of keeping "individuals from inflicting future harm." 386 U.S. at 609. Because in Specht, the Act was held to be an enhanced penalty statute

based, in essence, upon a new charge, see, e.g., United States v. Bowdach, 561 F.2d 860, 872-873 (10th Cir. 1977); State v. Williams, 295 N.C. 655, 249 S.E.2d 709, 720 (1978); State v. Sanders, 35 Or. App. 503, 582 P.2d 22, 24 (1978), a hearing was required before one could be sentenced thereunder.

The sections of the Act which the petitioner relies upon for his statutory liberty interest theory (sections 206, 210, 211 and 212), as well as section 209, were enacted by the Colorado General Assembly in response to the Specht decision and were designed only to meet the requirements of Specht, rather than to change the nature and purpose of the Act. People v. Breazeale, supra.1/ It is difficult to perceive any liberty interest in a statute which enhances the potential penalty for rape and deviate sexual intercourse from forty years imprisonment to imprisonment for the remainder of one's natural life. In fact, it seems incongrous to suggest that a liberty interest requiring a hearing exists both in being sentenced and in avoiding being sentenced under this statute. Specht v. Patterson, supra; People v. Breazeale, supra. Logically, due process should not require a hearing prior to the termination of sex offender proceedings since such termination eliminates the possibility of imposing a penalty potentially greater than that normally associated with the crimes of which an individual stands convicted.

II.

TERMINATION OF SEX OFFENDER PROCEEDINGS WITHOUT A HEARING DOES NOT VIOLATE EQUAL PROTECTION SINCE NO PARTY IS ENTITLED TO BE SENTENCED THEREUNDER ANYWAY.

The petitioner asserts that termination of sex offender proceedings without a hearing deprives him of equal protection of the law. This, he argues, follows from the fact that another individual, in like circumstances, having had a hearing and been found to constitute as threat to society, would necessarily receive the treatment, rehabilitation, and release under the Act which was denied him. This premise is faulty since other individuals in like circumstances who have the benefit of a hearing and are found to constitute a threat to society are not entitled to be committed under the Sex Offenders Act. Commitment under the Sex Offenders Act is always optional with the trial court. People v. Breazeale, supra; People v. Lyons, supra. In Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), this Court, in discussing the equal protection clause of the fourteenth amendment, noted:

> Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. Thus, it was that in Williams v. New York, 337 U.S. 241, 247 (1949), we said: 'The belief no longer prevails that every offense in a like legal category calls for identical punishment without regard to the past life and habits of a particular offender.'

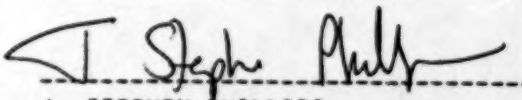
Accordingly, in the absence of a showing of arbitrary and invidious discrimination, the court's exercise of its discretionary power to sentence an individual as otherwise provided by law does not deny him the equal protection provisions of the fourteenth amendment. Andrus v. Turner, 421 F.2d 290 (10th Cir. 1970). Since the petitioner here neither avers nor establishes that the trial court acted discriminatorily in terminating the proceedings and in sentencing him as otherwise provided by law, he is not entitled to relief on equal protection grounds. Cf. Rhinehart v. Rhay, 440 F.2d 718 (9th Cir.), cert. denied 404 U.S. 825 (1971).

CONCLUSION

For the foregoing reasons, the respondent urges that certiorari be denied.

1/ The amendments neither provided for the treatment of an adjudicated sexual offender, as the petitioner apparently believes, nor altered the Act's effect as an enhanced punishment statute. Clearly, the amendments were intended not to assist an individual in receiving treatment of early release, but to prevent an arbitrary finding by a trial court which could possibly lead to life imprisonment.

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CERTIFICATE OF MAILING

I, J. Stephen Phillips, a member of the Bar of this Court, herewith certify that the within BRIEF IN OPPOSITION has been deposited in the United States mails, first-class postage prepaid, addressed to Michael Rodak, Jr., Clerk of the Court, Supreme Court of the United States, Washington, D.C., 20593 and that to my knowledge the mailing took place on July 22, 1980, within the permitted time for filing the brief.

J Stephen Phillips

STATE Colorado)
) ss.
COUNTY OF Denver)

Subscribed and sworn to before me this 22d day of July, 1980.

Mary Ellen Keates
NOTARY PUBLIC

My Commission expires:
12/5/82

ALI/HARSHF/C2